Supreme Court, U.S.
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No. 90-1891

In The

Supreme Court of the United States

October Term, 1990

LUCYLE KALISH and SOL JOSEPH KAMEN,

Petitioners,

- against -

FRANKLIN ADVISERS, INC., FRANKLIN DISTRIBUTORS, INC., FRANKLIN ADMINISTRATIVE SERVICES, INC., FRANKLIN RESOURCES, INC., FRANKLIN CUSTODIAN FUNDS, INC. (U.S. GOVERNMENT SECURITIES SERIES),

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONERS' REPLY BRIEF

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1. Respondents contend that no other circuit is in conflict with the second circuit on the precise statute in question. Of course, respondents do not contest, as they cannot, that other circuits (as well as this Court) have upheld the right to a jury trial under similar statutes authorizing court awards of damages. *See, e.g., Tull v. United States,* 481 U.S. 412 (1987); *Curtis v. Loether,* 415 U.S. 189 (1974); *Sibley v. Fulton DeKalb Collection Service,* 677 F.2d 830, 834 (11th Cir. 1982) ("We conclude that the Act's reference to an allowance of damages by the Court must be construed to embody the right of trial by jury."). *Cf. DePinto v. Provident Security Life Ins. Co.,* 323 F.2d 826, 836-37 (9th Cir. 1963), *cert. denied,* 376 U.S. 950 (1964) (corporate claim for damages against directors for breach of fiduciary duty triable before jury).

The seeming absence of conflict on Section 36(b) is due to the dominance of New York as the nation's financial center. Of the litany of twelve Section 36(b) cases cited by respondents at page 3 of their opposition brief, all but two were decided within the second circuit. This near monopoly of investment company oversight ought not permit one circuit to dictate unique principles of constitutional law in that area.

2. Respondents curiously rely upon *Tull v. United States,* 481 U.S. 412 (1987). *Tull,* however, supports petitioners' position that the relief sought is the most important determinant of a right to jury trial. Here, as in *Tull,* petitioners seek to recover statutorily authorized damages. As pointed out in the petition (pp. 6-7), many factors extraneous to amounts paid by the Fund may affect the computation of those damages. Accordingly, as in *Tull,* the petitioners are not seeking relief merely

"restoring the status quo"; *Tull* at 424, quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946). As in *Tull*, petitioners are entitled to a jury trial.

3. Respondents also rely upon *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90 (2d Cir. 1978). However, the action there was brought by the SEC, not by a private party. This distinguishing factor was essential to the court of appeals decision. The court there held that:

> [W]hen restitution is sought in the form and in the situations allowed in equity prior to the rules or authorized by valid statutes there is no right to jury trial. [Citation.] Disgorgement of profits *in an action brought by the SEC* to enjoin violations of the securities laws appears to fit this description; . . .

(574 F.2d at 95; emphasis added).

The court went on to hold that, from the standpoint of a defendant, there was no great difference between paying money in response to a private suit or an SEC suit; but:

> *the suit by the SEC* is decidedly more analogous to the traditional jurisdiction of equity to award restitution. Its availability is entrusted to the discretion of the court, a factor that has been considered significant in the resolution of the question whether back pay awards in discrimination cases are equitable or legal in nature. [Citations.] We thus agree with what Judge Weinfeld said on this subject in *SEC v. Petrofunds, Inc.*, 420 F.Supp. 958 (S.D.N.Y. 1976), interlocutory appeal under 28 U.S.C. § 1292(b)

> dismissed with prejudice. Accord, *SEC v. Associated Minerals, Inc.*, 75 F.R.D. 724 (E.D. Mich. 1977); . . .

(574 F.2d at 96; emphasis added).

The court's agreement with *SEC v. Petrofunds, Inc.*, 420 F.Supp. 958 (S.D.N.Y. 1976), and with *SEC v. Associated Minerals, Inc.*, 75 F.R.D. 724 (E.D. Mich. 1977), is particularly significant. In denying a jury trial in actions brought by the SEC, those cases emphasized that there was a "critical distinction between actions brought by the SEC and actions brought by private litigants" (*Petrofunds*, 420 F.Supp. at 960), and that the claims were "made in the context of an administrative enforcement proceeding" (*Associated Minerals*, 75 F.R.D. at 726). The "critical distinctions between actions brought by the SEC and private actions" were again recognized in *SEC v. Asset Management Corp.*, 456 F.Supp. 998, 1000 (S.D. Ind. 1978). Thus, *Commonwealth Chemical* serves to emphasize that there is a right to jury trial in a private action for damages.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
July 12, 1991

Respectfully submitted,

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